No. 82-1412

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MOENCH INVESTMENT COMPANY, LTD., a limited partnership, and THOUSAND PEAKS RANCHES, INC. d/b/a HOWELLS LIVESTOCK, INC., a corporation,

Petitioners,

—against—

UNION PACIFIC LAND RESOURCES CORPORATION, a corporation, CHAMPLIN PETROLEUM COMPANY, a corporation, and AMOCO PRODUCTION COMPANY, a corporation,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF OF PETITIONERS IN SUPPORT OF THE PETITION

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April 8, 1983

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REPLY BRIEF OF PETITIONERS IN SUPPORT OF THE PETITION

I.

The Claim Under the Pacific Railroad Act, Affecting Thousands of Landowners and Title to Millions of Acres in the West, Is Plainly Substantial and Warrants Review.

The determination by this Court as to whether the Union Pacific Railroad has violated Section 3 of the Pacific Railroad Act will affect the rights of surface owners with respect to almost seven million acres of land in the West. These lands include sections rich in oil and natural gas, valued in the many billions of dollars. They were acquired from the Union Pacific or its predecessors under the Pacific Railroad Act (the "Act") which the Petition asserts

necessarily precluded such subsurface reservations as part of the effort to effect Congress' avowed purpose of preventing landed monopolies from developing as a consequence of the land grants made in aid of the construction of a transcontinental railroad. *See Platt* v. *Union Pacific R.R.*, 99 U.S. 48 (1878). It is impossible to reconcile these facts, set forth in the Petition (at p. 5) and unchallenged by respondents, with respondents' assertion that the first question presented is of "minimal significance" and of "scant import" to any one other than petitioners. On the contrary, as the cases set forth in the Petition at p. 11 n. 9 reflect, this Court has consistently viewed as significant issues just such as are posed here involving railroads, land grant policies, millions of acres of land and thousands of landowners. The terms of the Act remain of vital concern today in judging the validity of the Railroad's claims.

With respect to the merits of the Pacific Railroad Act issue, the respondents struggle to interpret the Tenth Circuit's opinion in a fashion at odds with the Court of Appeals' own words and refuse to recognize that that court adopted one of the very interpretations which they themselves urged upon it. (Brief in Opposition at 11) (hereinafter "Br. Op.") Respondents assert that the Tenth Circuit held that this Court's decision in *Platt* v. *Union Pacific R.R., supra,* determined that the original mortgages of the land grant constituted a final disposition, satisfying the Act, leaving open only the possibility that a reconveyance to the Railroad upon satisfaction of the mortgage could alter this. But the Tenth Circuit did not so rule.* Rather, after noting that the question of what would occur with respect to unsold lands "'after the mortgage

* The *Platt* decision itself demonstrates that the Tenth Circuit would have erred had it adopted the interpretation now urged by respondents. The mortgaging of the lands in effect "stayed" application of the settlement and preemption clause. This Court in *Platt* made clear in language quoted by the Tenth Circuit that

shall be extinguished'" was left undecided in *Platt*, the Tenth Circuit continued:

> "We too need not consider the question, because the lands were in fact *sold upon foreclosure*. . . ." (Pet. at 8a) (emphasis added)

This is the Tenth Circuit's holding: the lands in question had been "sold" in the foreclosure. The Court of Appeals placed no reliance whatever upon any "disposition" language which would have been required had it considered the original act of mortgaging itself to have been controlling as respondents urge. Rather, the court held that a mortgage foreclosure transfer to the new railroad entity constituted a "sale" sufficient to satisfy Section 3. Although respondents assert that "[n]o such argument was made to the Court of Appeals" and characterize it as "implausible" (Br. Op. at 12), the argument adopted by the court was one explicitly urged upon it by each of the respondents.* Now, belatedly recognizing the facial inadequacy

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what happened to the lands once the mortgage was "extinguished" was not before it and was not being decided.

> "Nor are we now called upon to decide whether lands covered by the mortgage will not be open for preemption, if they shall remain unsold after the mortgage shall be extinguished. That question is not now before us." 99 U.S. at 64.

This Court did not limit the open questions to situations where the "mortgage debt [was] paid when due" as respondents suggest. (Br. Op. at 10-11) Rather, it left undecided the effect of any "extinguishment", by foreclosure or otherwise.

* In its brief to the Tenth Circuit respondent Amoco stated:

> "The mortgage foreclosure sale in 1899 of the land grant lands to the new Union Pacific Railroad Company, a Utah corporation, pursuant to court order and for value, undeniably constituted a sale and disposal of the old company's land." (Brief of Appellee Amoco Production Company at 19)

The Union Pacific respondents asserted that

> "the settlement and preemption proviso was extinguished either by the execution of the first mortgage in 1867, or in

of such an approach in light of this Court's rejection of just such argument in *United States* v. *Northern Pacific Ry.*, 311 U.S. 317 (1940), respondents attempt to disavow their own argument and the basis of the holding of which review is sought.

Respondents also emphasize that petitioner's predecessors were not settlers, as, indeed, they were not. But to conclude from this that Section 3 is irrelevant here is wholly to miss the point. Section 3 was designed both to benefit settlers *and* to prevent the creation of a landed monopoly in the Railroad.* The settlement and preemption clause was a mechanism designed to achieve these dual goals. (Pet. at 13-14) The statute must be interpreted with those policies in mind. When enacted, Sec-

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any event by the foreclosure and sale of the second mortgage in 1898." (Brief of Appellees Union Pacific Land Resources Corporation and Champlin Petroleum Company at 22)

* Respondents rely on *Platt* v. *Union Pacific R.R.*, *supra*, to support a claim that the latter policy was of only "incidental" significance. (Br. Op. at 9) Even if this reference in *Platt* (at variance in tone in this respect with other language in *Platt* itself, the Congressional history of Section 3 of the Act (see Pet. at 12-14) and this Court's earlier decisions) were accepted as wholly dispositive, respondents' argument that only settlers or pre-emptors can rely on Section 3 would be meritless. It accords *no* weight whatever to the Congressional anti-monopoly policy—a policy obviously flaunted by the Railroad's present ownership of more than seven million acres of the original land grant. Yet even *Platt*, while finding the anti-monopoly policy less significant than some other concerns, nevertheless recognized it to be one of Congress' "avowed object[s]" in enacting the legislation.

Moreover, the extent of this Court's departure in tone and language in *Platt* from its own decisions of but a few years earlier, may be traceable in no small part to what may now be seen as the lack of an actual case or controversy in *Platt*. As the record in the Tenth Circuit in the present case reflects, it has come to light in discovery in this case that Union Pacific's "opponent" in *Platt* was one of its own attorneys and that the lawsuit "against" the railroad was funded by the railroad itself. (Vol. VIII, Ex. 7-10, Record)

tion 3 prohibited the reservation of subsurface interests both because permitting such reservations would have frustrated settlement and preemption (since the subsurface held by the railroad could not be settled or preempted) and permitted a railroad land monopoly to develop. This basic element of Section 3 is unaffected by the passage of time, changes in or even repeals of homesteading or preemption laws. The Railroad was required either to sell land or to retain it in a form which subjected the land to settlement or preemption. Its failure to do so has resulted in perpetuation of just the landed monopoly Congress sought to avoid; the Railroad's means of accomplishing this frustration, the creation of subsurface reservations, violates Section 3 and is void.

Indeed, as the plaintiffs in a quiet title action, respondents must prevail on the strength of their own title. Violation of Section 3 would preclude their discharge of this burden wholly without regard to the identity of petitioners or their predecessors, a point respondents persistently seek to obscure. *See also* Pet. at 16-17, n. 14.

It is neither of "minimal significance" nor of "scant import" that the Union Pacific has, through its retention of public land grant lands, achieved just the land monopoly Congress sought to avoid and has done so in a manner violative of a statute explicitly designed to preclude that result. Such an issue, affecting thousands of landowners, millions of acres and billions of dollars, is worthy of this Court's review.

II.

The Failure of the Tenth Circuit to Certify a Question of Wyoming Land Law to the Wyoming Supreme Court Frustrates an Important State Interest and Warrants Review.

The most striking aspect of respondents' Brief in Opposition with respect to the issue of certification to the Wyoming Supreme Court is its *Catch-22* character. Thus, respondents seek to minimize the impact of the State of Wyoming's support for certification of the Wyoming law issue by noting that a brief *amicus curiae* was not filed in this action with this Court by the State of Wyoming and that the state "dismissed its own suits" (Br. Op. at 21) against the Railroad. What the respondents do not note is that the stipulation effected a settlement between the Union Pacific and the State and, far from simply "dismissing" the State's claims, provided that the Union Pacific would convey all its "right, title, and interest in and to the mineral estate, including without limitation any oil, gas, or liquid or gaseous hydrocarbons. . . ." with respect to one of the two parcels at issue.* What respondents also fail to disclose is that the Union Pacific had insisted upon an explicit clause barring the State of Wyoming from asserting any "interest" in this litigation as a condition to settling the litigation with the state referred to in the Brief in Opposition. It is solely the presence of that clause, rather than any of the reasons obliquely referred to by respondents, which has led the Attorney General of Wyoming to determine that the State was precluded from filing a brief *amicus curiae* in this Court.**

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* A copy of the settlement agreement referred to in the Brief in Opposition (p. 21 n. 29), is appended hereto at A1-A5.

** So that the Court may be fully informed as to the position of the State of Wyoming and the reasons for that position, we

Such circumstances, coupled with the extraordinary *ad hominem* nature of the challenge to the integrity of Wyoming's highest law enforcement officials, reinforce rather than diminish the concern that the state law issue be decided in state courts. They suggest the lengths to which the Union Pacific will go to limit the likelihood that Wyoming will be permitted to decide or even comment further on the issue. In any event, the earlier opinion of the Attorney General as to the incorrectness of the approach taken by the Tenth Circuit as to the state law issue presented here and the need for certification remains uniquely persuasive authority.

The respondents also capture an element of *Catch-22* in suggesting that once a federal court has ruled on a state law issue certification to the state court is thereafter improper. This wooden view of the relationship between state and federal courts is particularly disturbing in a situation where, as here, respondents have systematically thwarted, by removal and opposition to certification, every effort to obtain a definitive state court resolution of the Wyoming law issue. Respondents' approach puts a premium on such tactics. It reemphasizes the race to the courthouse and, as here, has had the effect of precluding any subsequent state court consideration of the state issue. This is particularly disturbing when the basic holding at issue is the product of deference to a single district judge by the federal appeals court.*

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annex to this brief, with the permission of the Attorney General of Wyoming, correspondence between the Attorney General and counsel for petitioners with respect to the possible submission by the State of a brief *amicus curiae*. *See* A6-A11.

* The reliance on the decision in *Coronado Oil Co.* v. *Grieves*, 603 P.2d 406 (Wyo. 1979) with respect to the underlying interpretation issue in the Brief in Opposition is misplaced. Even the Tenth Circuit has recognized that that decision is not "controlling." *Amoco Production Co.* v. *Guild Trust*, 636 F.2d 261, 265 (10th

Contrary to the respondents' suggestions, certification was sought on a timely basis in this case, briefed by all parties and argued to the Court. Certification is available in Wyoming.* The opinion cited by respondents in *Rhodes* v. *Bush*, No. 5640 (Wyo. April 28, 1982), makes precisely the opposite point from that for which respondents cite it. That case is explicit in noting that while in the past the Wyoming Supreme Court had required matters to be final in all respects, the question before it in that case, accepted for certification, did not fit that category; Justice Raper explicitly agreed that the matter should be reviewed and expressed the hope that in the case before it, involving certification of an interlocutory federal question, the Wyoming court would be "setting a new precedent for the consideration of [*intrastate*] interlocutory questions, the answer to which may be dispositive of a case at an early stage. . . . I see no reason to treat an interlocutory question from a federal court any differently than an interlocutory question from a state district court." (A copy of this opinion is appended hereto at A12.) The Wyoming Supreme Court remains ready to decide issues of Wyoming law certified to it by the federal courts. It should be given the opportunity finally to resolve this important question of state law.

Cir. 1980), *cert. denied*, 452 U.S. 967 (1981). The Tenth Circuit, of course, has acknowledged that "no Wyoming state court has passed upon the issue." 696 F.2d at 93. (Pet. A. 10a) The serious split in authority in other jurisdictions as to the issue is reflected in the Petition at p. 24, n. 20.

* It is not available in Utah. *See Holden* v. *N L Industries, Inc.*, 629 P.2d 428 (Utah 1981).

CONCLUSION

For the reasons set forth in the Petition and herein the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Settlement Agreement and Release of Claims

This Settlement Agreement and Release of Claims is entered into by and between the State of Wyoming ("Plaintiff"), on the one hand, and on the other hand Union Pacific Land Resources Corporation ("UPLRC"), Champlin Petroleum Company ("Champlin"), Union Pacific Corporation, Union Pacific Railroad Company, and Upland Industries Corporation (collectively "Defendants"). It settles and finally resolves all claims by Plaintiff against Defendants in Civil Action No. 69-1372, filed in the Third Judicial District Court of Uinta County, State of Wyoming, on September 24, 1979 ("the Uinta County Case"), and in Civil Action No. 3755, filed in the Third Judicial District Court of Sweetwater County, State of Wyoming, on October 22, 1979 ("the Sweetwater County Case"). This Settlement Agreement and Release of Claims shall be binding upon and inure to the benefit of the parties hereto, their successors and assigns.

KNOW ALL MEN BY THESE PRESENTS THAT

WHEREAS, Plaintiff has brought suit against Defendants and against Amoco Production Company ("Amoco") in the Uinta County Case and in the Sweetwater County Case, claiming title to minerals in certain lands described in the respective Complaints in those civil actions;

WHEREAS, Plaintiff is the owner of record of the lands described in Exhibit A to this Agreement ("the Uinta County Lands"), subject to a recorded reservation of minerals in favor of Union Pacific Railway Company, its successors and assigns;

WHEREAS, Plaintiff is the owner of record of the lands described in Exhibit B to this Agreement ("the Sweetwater County Lands"), subject to recorded reservations of minerals in favor of Union Pacific Railroad Company, its successors and assigns;

WHEREAS, Plaintiff is not the record owner of and does not now claim any interest in any lands described in the Complaint in the Sweetwater county Case other than those described in Exhibit B hereto;

WHEREAS, UPLRC and Champlin are successors to all right, title, and interest of Union Pacific Railway Company in and to any minerals in the Uinta County Lands, and to all right, title, and interest of Union Pacific Railroad Company in and to any minerals in the Sweetwater County Lands, and, as successors thereto, claim the entire mineral estates in the Uinta County Lands and in the Sweetwater County Lands, respectively;

WHEREAS, the lease from Champlin to Amoco granting oil and gas rights in the Uinta County Lands as alleged in paragraph 10 of the Complaint in the Uinta County Case has been released, and Amoco no longer claims any right, title, or interest in or to the Uinta County Lands or the mineral estate in such lands;

WHEREAS, Plaintiff warrants and represents that it is not aware of any lands that it owns, other than the Uinta County Lands and the Sweetwater County Lands, except those Sweetwater County Lands within the Chain Lakes Big Game Winter Range not described in the Complaint, to be covered by separate agreement, that are subject to mineral reservations in the form of either of the aforementioned recorded reservations in favor of Union Pacific Railway Company and Union Pacific Railroad Company,

respectively, and their respective successors and assigns; and

WHEREAS, Plaintiff and Defendants are desirous of finally resolving by compromise all the matters encompassed in the Complaints in the Uinta County Case and the Sweetwater County Case.

NOW, THEREFORE, in consideration of the covenants herein contained, Plaintiff and Defendants mutually agree as follows:

1. Promptly after entry of both an order of the Third Judicial District Court of Uinta county dismissing the Uinta County Case with prejudice and an order of the Third Judicial District Court of Sweetwater County dismissing the Sweetwater County Case with prejudice;

(a) UPLRC and Champlin will deliver to Plaintiff a quitclaim deed, in the form of Exhibit C, hereto, conveying to Plaintiff all their right, title, and interest in and to the mineral estate, including without limitation any oil, gas, or liquid or gaseous hydrocarbons, in the Uinta County Lands;

(b) Champlin and UPLRC will deliver to Plaintiff a surface owner's agreement, in the form of Exhibit D, hereto, covering the Sweetwater County Lands.

2. Plaintiff waives and relinquishes any and all claim, right, title, and interest to any part of the mineral estates, including without limitation any oil, gas, or associated liquid or gaseous hydrocarbons, in the Sweetwater County Lands.

3. Plaintiff agrees that, in light of this Agreement, it has no interest in any of the pending litigation described

in Exhibit E hereto, or in any suit involving similar challenges to record mineral titles of the Defendants or Amoco or any of their successors by any of the adverse parties in said litigation or by any of their successors.

4. Plaintiff and Defendants will, upon execution of this Agreement, execute:

(a) a Stipulation of Dismissal with Prejudice for the Uinta County Case, together with a proposed order of dismissal in the form of Exhibits F and G hereto, and

(b) a Stipulation of Dismissal with Prejudice for the Sweetwater County Case, together with a proposed order of dismissal in the form of Exhibits H and I hereto,

and Plaintiff will file such Stipulations and proposed orders in, respectively, the Third Judicial District Court of Uinta County and the Third Judicial District Court of Sweetwater County.

5. Plaintiff hereby acknowledges full and complete satisfaction of, and does hereby fully and forever release and discharge the Defendants and Amoco from any and all claims, demands, losses, and liabilities of any kind or nature whatever, whether known or unknown, suspected or unsuspected, concealed or hidden, which Plaintiff now owns or holds or has at any time heretofore owned or held against Defendants or Amoco and which arise out of or are in any way connected with or related to the transactions, rights, occurrences, events, acts or omissions set forth, or the facts alleged in the Complaints filed in the Uinta County Case and the Sweetwater County Case. It is a condition hereof and it is the intention of the parties in executing this instrument that the same shall be effective as a bar to each and every claim, demand, and cause of action

hereinabove specified, but limited to those lands which are the subject of this Agreement.

6. The Plaintiff represents and warrants that it has not heretofore assigned or transferred, or purported to assign or transfer, to any other person or entity any claim or other matter herein released.

7. This instrument effectuates a compromise and settlement of a disputed claim and in no way constitutes an admission by any of the parties of any defect of title or any fault whatever or of any liability whatever in connection with any matter or thing.

Dated this 6th day of May, 1981
State of Wyoming

By /s/ STEVEN F. FREUDENTHAL
Attorney General

Approved:

By /s/ ED HERSCHLER
Governor

Dated this 14th day of April, 1981

Union Pacific Land Resources Corporation
By /s/ D. THOMAS KIDD

Champlin Petroleum Company
By /s/ D. THOMAS KIDD

Union Pacific Corporation
By /s/ D. THOMAS KIDD

Union Pacific Railroad Company
By /s/ D. THOMAS KIDD

Upland Industries Corporation
By /s/ D. THOMAS KIDD

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**ADMITTED FRANCE

February 6, 1983

Dear Attorney General McClintock:

I very much appreciate the opportunity to offer a final submission — reargument, if you will, — on the question of whether the State of Wyoming may, consistently with the Settlement Agreement it reached with the Union Pacific, submit to the United States Supreme Court a brief amicus curiae on the certification issue we discussed in your office. I premise this submission on the notion that if the State were free to submit such a brief that it would, as you have advised me, do so. I also premise the letter on my understanding that you would not agree to file any brief if in doing so the State violated any commitment duly made on its behalf.

I start with the text of the Agreement itself. Paragraph 3 sets forth the State's agreement, in light of the settlement being reached with respect to Uinta and Sweetwater County Lands (¶¶ 1 and 2), that "it has no interest" in, inter alia, the Moench litigation. What kind of "interest" did the State agree it did not have? Some possible definitions may, I suppose, be quickly dealt with. The State was surely not promising to be apathetic towards or lacking in curiosity about the result of the litigation affecting hundreds of thousands of acres of lands within it properties. Nor, I believe, was it promising to withhold its opinion on general issues of law affecting the citizens of Wyoming which happened to arise in the case, but were in no way dependent on the fact that the State itself had specifi

property interests at issue in the litigation. Issues such as what forum should decide questions on Wyoming law seem to me clearly on that abstract and general level -- although, to be sure, they have practical consequences as do the resolution of all other legal issues.

What ¶ 3 was about, as I view it, was one of two things -- or both of them. At the very least, it was an explicit recognition by the State that it had no property interest in the various litigations between Union Pacific and various third parties, including my clients; in this respect ¶ 3 is the counterpart of the waiver of claims already in litigation between Union Pacific and the State (¶ 2) and was intended to be more specific than the general "catch-all" waiver language of ¶ 5. Beyond any waiver of any property interest, ¶ 3 could also be read at its broadest as barring the State from taking any position on the substantive issues which had been raised in the case commenced by the State itself or perhaps even on the substance of legal issues not raised in the State's case but which were raised in that involving my client. The effect of this reading (which I believe is not only an exceedingly broad one but is subject to the public policy limitations stated below) would be to preclude the State from taking a position on the meaning, under Wyoming law, of reservations of "coal and other minerals" and, perhaps as well, on the issue of whether Section 3 of the Pacific Railway Act was adhered to by the Union Pacific in the years that have passed since the Congressional decision-making process engaged in under President Lincoln.

However broadly one reads the Settlement Agreement, I believe it cannot fairly and properly be read broadly enough to preclude the State from taking a position on the issue of whether, and under what circumstances, Wyoming Stat. 1-13-101 et seq. permitting certification of issues from Federal courts to the Wyoming Supreme Court may and should be utilized. Indeed, it seems to me that even an explicit agreement to that effect, let alone an implied undertaking to such effect, would be impossible to square with notions of public policy. The sovereign simply cannot be estopped from asserting its views as to the enforcement of its own law.

Perhaps a few examples can best illustrate the point. Suppose, for example, that the Union Pacific had opposed certification to the Wyoming courts on the ground that those courts were corrupt or incompetent. Or suppose that my clients had urged that mineral and other subsurface reservations were wholly ineffective in all cases in Wyoming. It would, in my view, be flatly contrary to public policy for the State of Wyoming to

consider itself as being barred from giving its views on either of those issues as a result of the Settlement Agreement. To carry the point one step further, suppose the Supreme Court of the United States itself requested the views of the State of Wyoming on certification. Would the State be barred from responding by its agreement with the Union Pacific? If you conclude it would not, as I believe you would, how would the request alter any contractual obligation, if one exists, barrin the expression of views? It is my conclusion as I go through t exercise provided by these hypotheticals that the State simply could not have intended and, consistent with the proper exercis of power by state officials, may not be considered to have agre to withhold the views of the State in circumstances where, as here, it would otherwise choose to express them.

I know you will consider the matter fully and careful and decide the matter in the best interests of the people of Wyoming. If you believe it would be at all useful, I would be delighted to come to Cheyenne at your convenience to discuss th matter further with you.

Respectfully yours,

Floyd Abrams

Honorable A. G. McClintock
Attorney General of Wyoming
123 State Capitol
Capitol Avenue at 24th Street
Cheyenne, Wyoming 82002

VIA AIR COURIER

cc: Richard Rideout, Esq.

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February 8, 1983

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RE: Moench v. Union Pacific Railroad Co.
Amicus Brief

Dear Mr. Abrams:

The enclosed copy of a letter to Richard Rideout had been written by me but not sent out when I received your recent telephone call. I have now received your letter of February 6, 1983, in which you urge me to reconsider that move. Your arguments are well constructed, but I cannot bring myself to accept the narrow construction of the word "interest" which you place upon that word as used in our contract of settlement with the Union Pacific.

While I am sorry that I was not aware of that contract at the time I talked with you in my office, I cannot accept the argument that we would not be violating the spirit thereof if we filed the amicus brief we discussed. I must, therefore, adhere to my original decision as announced to you over the telephone and decline to participate any further in the case.

Sincerely,

A. G. McClintock
Attorney General

AGM:llc

THE STATE OF WYOMING

ED HERSCH
GOVERNO

In reply refer to:

Attorney General

A.G. McCLINTOC
ATTORNEY GENERA

CHEYENNE, WYOMING 82002
PHONE 307 777-7841

January 31, 1983

Mr. Richard Scott Rideout
Vines, Rideout and Gusea
Deming Building, Suite 305
1620 Central Avenue
Cheyenne, Wyoming 82001

Re: State participation in Amicus Curiae Brief in Moench Investment Company et al. v. Union Pacific Land Resources Corporation et al.

Dear Richard:

At our meeting with Mr. Abrams, Mr. Thompson and you concerning the State of Wyoming submitting an amicus curiae brief in support of the Petition for Writ of Certiorari to be filed by Moench Investment, we peripherally explored the possibility that such activity might violate the terms of the Settlement Agreement entered into between the State and U.P. in the actions which we had filed in Uinta and Sweetwater counties. We have exhumed the Settlement Agreement from the archives and have concluded that it would not be appropriate for the State to submit an amicus brief.

The language of the Settlement Agreement which leads us to the conclusion that state participation would be improper is:

> 3. Plaintiff agrees that, in light of this Agreement, it has no interest in any of the pending litigation described in Exhibit E hereto, or in any suit involving similar challenges to record mineral titles of the Defendants or Amoco or any of their successors by any of the adverse parties in said litigation or by any of their successors.

One of the actions identified in Exhibit E is the Moench case.

I can sympathize with your desire to have the State of Wyoming participate in this matter; however, it appears to me that we are bound by the terms of the Settlement Agreement. Even if it could be argued that filing an amicus brief would not violate the narrow terms of the Agreement, I feel that any participation by the State would ruin our credibility in settling future suits and in subsequent appearances in the United States Supreme Court.

I'm sorry that we will not be able to prepare an amicus brief, for the large question raised concerning the balance of powers as they relate to federalism would have been fascinating to work on.

Sincerely,

A. G. McClintock
Attorney General

AGM:dm

cc: Lee Thompson
Martin, Pringle, Davis,
Oliver and Triplett
300 Page Court, 220 West Douglas
Wichita, Kansas 67202

Floyd Abrams, Esq.
Cahill, Gordon and Reindel
800 Pine Street
New York, New York 10005

Order Accepting Certification of Questions of Law From Federal Court, Giving Notice Thereof, and Directing Briefs and Arguments on an Additional Issue

IN THE

SUPREME COURT

STATE OF WYOMING

OCTOBER TERM, A.D. 1981

No. 5640

SANDRA S. RHODES, *et al.*,

Plaintiffs,

v.

BRADLEY BUSH, *et al.*,

Defendants.

ORDER ACCEPTING CERTIFICATION OF QUESTIONS OF LAW FROM FEDERAL COURT, GIVING NOTICE THEREOF, AND DIRECTING BRIEFS AND ARGUMENTS ON AN ADDITIONAL ISSUE

The United States District Court for the District of Wyoming, having certified the following questions of law to this court for answer pursuant to § 1-13-104, W.S. 1977:

"(a) What is the effect of the apparently inadvertent repeal of Wyoming's Wrongful Death Statutes, W.S. 1977, § 2-14-201-202, by Chapter 151, Section 3, Session Laws of Wyoming, 1981?

"(b) Are litigants in Wyoming, including the Plaintiffs in the above-entitled action, now without a remedy for claims for damages for wrongful death brought, under 42 U.S.C. 1983 and 1988 in view of the common law rule

> that actions for personal injuries including wrongful death, do not survive the death of the person injured by the alleged tort?",

and it appearing to the United States District Court for the District of Wyoming that there is no controlling precedent on the point, it is

ORDERED that said certification be, and the same hereby is, accepted by this court for answer to such questions, and it is

FURTHER ORDERED that the clerk of this court furnish a copy of this order to each of the present parties to this action by transmitting the same to their attorneys of record by registered mail, return receipt requested, and that the same be notice to them of such acceptance for the purpose of setting times for briefs and oral arguments pursuant to Rule 11.06, W.R.A.P., and it is

FURTHER ORDERED that such briefs and oral arguments address the following additional question:

> Whether § 8-1-107, W.S. 1977 and Matter of Estate of Boyd, Wyo., 606 P.2d 1243 (1980), cause this case to be subject to the provisions of the Wyoming Wrongful Death Act which was in effect when the cause of action arose.

Dated January 8, 1982.

* By the Court:

/s/ R. R. ROSE, JR.
ROBERT R. ROSE, JR.
Chief Justice

Filed: January 8, 1982

Appendix

* RAPER, Justice.

I join in the foregoing order but wish to make some observations. The questions presented are interlocutory, that is they are questions raised during litigation and not in connection with a final disposition of the case, where the only question remaining after trial is whether there is an applicable wrongful death statute. We would in all likelihood not consider the questions at the stage of the pending case if it were one before one of the district courts of Wyoming, on an interlocutory appeal, that is to say in a case not yet finally concluded through trial. This court has repeatedly held that a judgment or order which determines the merits of a controversy and leaves nothing for future consideration by the trial is final and appealable, and it is not appealable unless it does those things. Public Service Commission v. Lower Valley Power and Light, Inc., Wyo., 608 P.2d 660 (1980); Arp v. State Highway Commission, Wyo., 567 P.2d 736 (1977).

The legislature was aware of that well-known appellate doctrine when it enacted § 1-13-106, W.S. 1977:

> "The supreme court *may* answer questions of law certified to it by a federal court when requested by the certifying court if there are involved in any proceeding before the *federal court questions of law of this state which may be determinative of the cause then pending in the federal court,* and as to which it appears to the federal court there is no controlling precedent in the existing decisions of the supreme court." (Emphasis added.)

I can agree that if we decide the statute was repealed, then that would "be determinative" of the case pending in federal court and the plaintiffs' complaint there dismissed, unless

the statute was in effect and still viable for the purposes of a cause arising in 1979, prior to any repeal, if it was in fact repealed. The latter possible alternative is the thrust behind the question this court presents in addition to the one posed by Judge Brimmer.

We may decide one way or another that the statute is in effect. In that event, then the federal case would go to trial. If the plaintiff failed, as administrator, to prove her case or it is settled somewhere along the line, then we have needlessly decided that the statute was in effect for the purposes of this particular case or was not repealed. There is a big jump between alleging a cause of action and proving it. That is the reason this court has insisted upon a case being completely disposed of in the trial court before we will consider it on appeal. The same concept would apply to certified questions from a federal court.

I have great respect for the position taken by Judge Brimmer that he has a question which ought to be decided by this court. State courts should decide questions of state law. I also agree that it ought to be decided now, in order to settle a question which has been nagging not only the United States District Court but some of the state district courts.

It should be noted that in the cases cited above, I have dissented because I thought some interlocutory questions were important enough for us to decide and perhaps save the wasted time of a trial. I am hopeful that we are setting a new precedent for the consideration of interlocutory questions, the answer to which may be dispositive of a case at an early stage. I gave up dissenting and have watched and joined in many orders where this court refuses to move from the adamant concepts expressed in Public Service

Commission and Arp, supra. I see no reason to treat an interlocutory question from a federal court any differently than an interlocutory question from a state district court.

CERTIFIED TRUE COPY:

/s/ RITA M. WHITE,
RITA M. WHITE, CLERK
WYOMING SUPREME COURT
Dated at Cheyenne, Wyoming,
this 28th day of April 1982.